IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1400 of 2007

For Approval and Signature:
HONOURABLE MR.JUSTICE D.H.WAGHELA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GOPAL RAMOURTI AND OTHERS
Versus
STATE OF GUJARAT AND OTHERS

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Appearance :
MR BB NAIK for Applicants.
MR LB DABHI, APP for Respondent No.1.
MR JV JAPEE for Respondent No.2.
NOTICE SERVED BY DS for Respondent Nos.3 - 4.

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 18/10/2007

ORAL JUDGMENT

1. Rule, service of which is waived by learned APP, Mr.Dabhi and learned advocate, Mr.Japee on behalf of respondent nos.1 and 2 respectively. The petitioners have invoked Article 226 of the Constitution and provisions of Section 482 of the Code of Criminal Procedure, 1973 (for short "the Code") for the relief of orders dated 31-1-2001 in Criminal

Case No.782/1998 and dated 30th April 2007 in Criminal Revision Application No.13/2001 being set aside.

2. Relevant facts in brief are that the complainant representing respondent no.2 initially filed Criminal Complaint No.52/1997 in the Court of learned Chief Judicial Magistrate for the offence under Section 132 of the Negotiable Instruments Act, 1881 (for short "the Act"), upon three cheques issued in December 1996 and January 1997 having been returned on 7-4-1997 by the bank as the accused had not maintained sufficient balance. That complaint showed as a complainant, Pinakin C. Shah, Executive of M/s. Yash Packaging and the only accused was described as Mr.L.N.K. Murthy, Managing Director, Care Unipack Private Limited. After registering the complaint on 21-5-1997, enquiry was ordered to be held under Section 202 of the Code and by order dated 13-4-1998, after finding a *prima facie* case, process was ordered to be issued. Thereafter, the original complainant moved an application to join as accused no.2, one Mr.C.V.S. Desoza, as the Director and authorized signatory of the company, since cheques in question appeared to have been signed by that person. The Court allowed the application to join him as an accused person by exercising its power under Section 319 of the Code by order dated 3-5-2000. Thereafter another application dated 4-1-2001 was made to submit that the petitioners herein were responsible directors of the company and, hence, it was necessary and in the interest of justice to join them as the accused persons. That application was allowed by the impugned order dated 31-1-2001, wherein, relying on judgment of this Court in **Bhavesh Bharatbhai Mehta and Others v. State of Gujarat and Another [1999 (2) GLR 1323],** it was held that all the directors of the company were not required to be served with notice, if the company were accused of commission of offence under Section 138 of the Act. It was observed

that the Court had already taken cognizance of the offence against the company and its managing director and, hence, in exercise of powers under Section 319 of the Code, the petitioners were ordered to be joined as accused persons and summoned by issuing process.

3. The petitioners filed Criminal Revision Application No.13/2001 to challenge the aforesaid order, which was rejected by the second impugned order dated 30th April 2007. Learned Additional Sessions Judge, while rejecting the Revision Application, went further and observed that even if the revisionists were not given opportunity of hearing before impleading them as the accused, it would not be a ground to upset the impugned order and even if they were appointed as additional directors of the company after issuance of the disputed cheques, then also they could not avoid their liability with regard to the responsibility of the company. The Court further ordered :

> "Revisionists are hereby directed to extend their residential cooperation as well as complainant is also ordered to extend his effective cooperation for early disposal of the said case being of 1998, that too, within the period of six months from the date of receipt of this order.
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> Revisionists have to disclose their business as well as original address before the Learned Chief Judicial Magistrate and Learned Trial Judge is directed to dispose the entire Criminal case within the said period.
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> Learned Advocates for the revisionists are directed to keep their clients/revisionists present before the court of Chief Judicial Magistrate or the court before which the case is pending for

further progress on 9.5.2007.

Record and proceedings be sent back to pavilion.

Cost will abide the event.

Signed and pronounced in the open court on this 30th day of April, 2007.

Date. 30.4.2007 Sd- M.S.Shaikh

Place : Himmatnagar 2nd Addl.Sessions Judge

Sabarkanth at Himmatnagar."

The Criminal Revision Application preferred by the petitioner was thus dismissed after six years of its pendency with the above order.

4. Learned counsel, Mr.B.B.Naik, appearing for the petitioner submitted that the impugned first order dated 31-1-2001 was made in exercise of the powers conferred upon the Court under Section 319 of the Code, but for the exercise of that power essential condition of any evidence or material being before the Court was not fulfilled insofar as the order was made on the bare application of the complainant. He further submitted that neither the original complaint nor the application of the complainant to join petitioners as party contained any averment to implicate the petitioners in offence under Section 138 of the Act. It was nowhere averred or even alleged by the complainant that the petitioners were in-charge of or were responsible to the company for the conduct of its business nor was it alleged that the alleged offence was committed with the consent or connivance of the petitioners or was attributable to any neglect on their part. He submitted that, in fact, the basic averment

or allegation of the offence having been committed by the company was absent and the company was never joined as accused person in any of the proceedings. It was, therefore, submitted that on mere *ipse dixit* of the complainant, the petitioners were compelled to face the trial without any allegation, which could be the basis of their conviction or even implication in the offence. Mr.Naik relied upon the Division Bench judgment of this Court in **Satish Chand Singhal v. State of Gujarat & Others [GLR 2006 (3) page 2209**], wherein it was observed that before exercising powers under Section 319 of the Code, it is not necessary that the evidence must have been adduced in the case and a document which may be produced, with the application filed under Section 319 of the Code also constitutes 'evidence' within the meaning of that Section. However, in the facts of that case, the application under Section 319 of the Code, inter alia, stated that the petitioner was in-charge of and was responsible to the company for the conduct of its business, and therefore, he should have been impleaded as an accused in the complaint which was already lodged and pursuant to which summons were issued. Along with that application, copies of agreement were annexed and on the basis of the uncontroverted material, order under Section 319 of the Code was made, after commencement of trial. Whereas in the facts of the present case, nothing was shown to have been placed on record to substantiate even the averment that the petitioners were directors of the company, which itself also was not joined as an accused person in the criminal case.

4.1 Mr.Naik relied upon the recent judgment of the Supreme Court in **K. Srikanth Singh v. M/s. North East Securities Ltd. & Another [JT 2007 (9) SC 449],** wherein the judgment in **Sabitha Ramamurthy and another v. R.B.S. Channabasavardhya [JT 2006 (12) SC 20]** was quoted with approval and out of that quotation the following

observations were emphasized.

> "..... Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance with the statutory requirements would be insisted. Not only the averments made in para 7 of the complaint petitions do not meet the said statutory requirements, the sworn statement of the witness made by the son of the respondent herein, does not contain any statement that the appellants were in charge of the business of the company. In a case where the court is required to issue summons which would put the accused to some sort of harassment, the court should insist strict compliance with the statutory requirements. In terms of Section 200 of the Code of Criminal Procedure, the complainant is bound to make statements on oath as to how the offence has been committed and how the accused persons are responsible therefor. ...."

5. Learned counsel, Mr.J.V.Japee, appearing for the original complainant submitted that irrespective of the conditions contained in Section 319 of the Code, the petitioners were liable to be joined as accused persons in the original criminal proceedings. In view of the fact that the original complaint was filed against Mr.Murthy, obviously in his capacity of Executive of the company, and while the notice under Section

138 was served upon the accused person, it was sufficient notice to the company and other directors of the company were not required to be separately served with the notice. The complainant came to know about induction of the petitioners as directors only after service of notice and filing of the complaint and, hence, the application for joining them as accused persons was made later on. It has now transpired from the petition itself that the petitioner had come to be appointed as directors on 29-4-1997 while period for making payment pursuant to the notice was expiring on 5-5-1997, according to his submission. On that basis, it was submitted that, in any case, when the company had the opportunity to make payment and avoid prosecution, the petitioners were directors of the company and presumed to be in-charge of the company or at least to be in a position to make payment and avoid the prosecution. He however could not show that the facts about induction of the petitioners as directors in the company were placed on record by the complainant in any of the proceedings so far and no averment or allegation whatsoever regarding their complicity in the transactions, or in the commission of the offence could be found in any of the applications or complaint of the complainant.

5.1 Mr.Japee relied upon judgment of the Supreme Court in **The Vice-Chancellor, Jammu University and Another v. Dushinant Kumar Rampal [AIR 1977 SC 1146]** to submit that if the Court was otherwise competent to join the petitioners as accused persons, the order cannot fail merely because it purported to have been made under a wrong provision of law. He relied upon the judgment of the Supreme Court in **Raghubans Dubey v. State of Bihar [AIR 1967 SC 1167]** to submit that the Court must have taken cognizance of the offence and it was the duty of the learned Magistrate to find out who the offenders really were and once he came to the conclusion that apart from the persons joined as

accused persons, some other persons were involved, it was his duty to proceed against those persons. Summoning of additional accused was part of the proceeding initiated by taking cognizance of the offence. Mr.Japee also relied upon recent judgment of the Supreme Court in **Anil Hada v. Indian Acrylic Limited [AIR 2000 SC 145]** in support of the submission that actual offence should have been committed by the company, and then alone the categories of persons enumerated in Section 141 of the Act could become liable for the offence. But instead of prosecuting the company if a payee opts to prosecute only the persons falling within the second or third category, the payee can succeed in the case only if he succeeds in showing that the offence was actually committed by the company. In such a prosecution the accused can also show that the company had not committed the offence, though such company was not made an accused, and hence the prosecuted accused would not be liable to be punished. However, the provisions do not contain a condition that prosecution of the company is *sine qua non* for prosecution of the other persons who fall within the second and third categories. No doubt a finding that an offence is committed by the company is *sine qua non* for convicting those other persons. But if a company is not prosecuted due to any legal snag or otherwise, the other prosecuted persons cannot, on that score alone, escape from the penal liability created through the legal fiction envisaged in Section 141 of the Act.

6. It is clear in the peculiar facts of the present case that not only that the petitioners were not implicated as accused persons in the original complaint but even at the stage of implicating managing director of the company as signatory of the cheque neither the company nor the present petitioners were joined as the accused persons or the opponents. That was not done during the period of about one year of enquiry under

Section 202 of the Code, or before filing the application one year thereafter, to join them as accused persons. The complainant did not produce any material or evidence to make or substantiate any allegation against the petitioners which could *prima facie* satisfy the Court that they were required to be proceeded against either under Sub-section (1) or Sub-section (2) of Section 141 of the Act. In those circumstances, irrespective of the impugned orders, complaint and criminal proceedings as against the petitioners were liable to be quashed in exercise of the powers of this Court under Section 482 of the Code. As held by the Supreme Court in **Sabita Ramamurthy** (supra) the Court is required to insist upon strict compliance with the statutory requirements before issuance of summons which would put the accused persons to some sort of harassment. The complainant is bound to make statement on oath as to how the offence had been committed and as to how the accused persons were responsible for that. Therefore, in absence of such averments or statement on oath or even allegations, criminal proceedings as against the petitioners are liable to be quashed and the impugned orders are required to be set aside. It has to be, however, clarified that since the evidence of the complainant is yet to be led in the trial Court, it would be open for the complainant to lead necessary evidence with regard to commission of offence by the company and as regards the person, who could be proceeded against under the provisions of Section 141 of the Act. Consequently, the Court would not be precluded from exercising its power under Section 319 at the appropriate stage, if it appears from the evidence that any person not being the accused before it has committed any offence for which he could be tried together with the accused. Subject to these observations, petition is allowed with the direction that impugned orders dated 31-1-2001 in Criminal Case No.782/1998 and the order dated 30th April 2007 in Criminal Revision Application No.13/2001 shall stand quashed and

Criminal Case No.782/1998, as against the petitioners, shall also stand quashed. Rule is made absolute accordingly with no order as to costs.

(D.H.Waghela, J.)

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